Supreme Court, U.S.
F I L E D

96 900 DEC 2 1996

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

T. M. VISWANATHAN --- PETITIONER

VS.

BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA et al. --- RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Tenkasi M. Viswanathan, Pro Se
7405 Alcoa Way
Wilmington NC 28405
Tel: 910-686-5395

RECEIVED
DEC - 5 1996
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Where academic freedom is a vested legal right under North Carolina laws guaranteed to all academic staff of a (four-year) university and academic freedom includes in its ambit research and publication, can it be said that such matters are not of public interest and so not covered by the First Amendment to the United States Constitution without compromising the constitutional guarantees provided therein?

2. What are the "constitutional dimensions of delay" in due process requirements that should be stated in a complaint to assert a claim that one was deprived of property or/and liberty without the process that was due to him?

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

T. M. VISWANATHAN,

Plaintiff-Appellant;

THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS; C.D. SPANGLER, JR in his official capacity; THE FAYETTEVILLE STATE UNIVERSITY BOARD OF TRUSTEES; Dr. JESSE WILLIAMS in his official and individual capacity; Dr. LLOYD V. HACKLEY in his official and individual capacity; Dr. LEO EDWARDS in His official and individual capacity,; Dr. JON YOUNG in his official and individual capacity; Dr. MORRIS BLOUNT, in his official and individual capacity; Dr. JOSEPH MONROE in his official and individual capacity; Dr. CLARENCE WHITE, in his official

and individual capacity; KAYE WEBB, in her official and individual capacity; and Dr. FELTON THOMAS in his individual and official capacity

Defendants-Appellees.

This petition is not being submitted by or on behalf of any corporation, and there is no parent or subsidiary company to be listed by the petitioner.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

MATTERS OF ACADEMIC FREEDOM 3

WHEN DOES DELAY CONSTITUTE A CLAIM 5

THE 1991 AMENDMENT TO 42 U.S.C. SECTION 1981 AND COLOR OF STATE LAW 7

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 9

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 10

REASONS FOR GRANTING THE PETITION . . . 21

FIRST AMENDMENT CLAIM UNDER SECTION 1983 21

PRIOR ADMINISTRATIVE HEARINGS 26

DUE PROCESS 27

DELAY CONSTITUTES A CLAIM . . . 28

CONCLUSION 30

INDEX TO APPENDICES

Page

APPENDIX A. . . . . . .

ORDER Entered by the United States Court of Appeals for the Fourth Circuit on September 3, 1996 . . . . . A-1

APPENDIX B . . . . . .

Judgment In Favor of the Defendants Entered on March 1, 1996 by the United States District Court for the Middle District of North Carolina A-4

MEMORANDUM OPINION Entered on March 1, 1996 Accompanying JUDGMENT Granting Motion to Dismiss A-5

DECISION by The University of North Carolina Board of Governors made on September 16, 1991. . . . . A-27

REPORT of the Committee on Personnel and Tenure, The University of North Carolina made on September 13, 1991. . . . . A-29

DECISION by The University of North Carolina Board of Governors made on June 16, 1992. . . . . A-34

REPORT of the Committee on Personnel and Tenure, The University of North Carolina, . made on June 16, 1992 . . . . . A-35

ORDER on Petition for Judicial Review Entered on February 24, 1993 by the Superior Court of New Hanover County, North Carolina A-38

DECISION of the Fayetteville State University Board of Trustees made on October 5, 1993 . . . . . A-42

DECISION by The University of North Carolina Board of Governors made on September 9, 1994. . . . . A-44

REPORT of the Committee on University Governance, The University of North Carolina A-46

APPENDIX C

ORDER Entered on 23rd of April, 1996 by the District Court for the Middle District Of North Carolina Stating Lack of Jurisdiction to Rule on Plaintiff's Motion Under Rules 52(b) and 59(e) A-51

APPENDIX D

TENURE POLICIES AND REGULATIONS OF FAYETTEVILLE STATE UNIVERSITY, Section 1. FREEDOM AND RESPONSIBILITY IN THE UNIVERSITY A-54

TENURE POLICIES AND REGULATIONS OF FAYETTEVILLE STATE UNIVERSITY, Section 2. ACADEMIC FREEDOM AND RESPONSIBILITY OF FACULTY A-55

TENURE POLICIES AND REGULATIONS OF FAYETTEVILLE STATE UNIVERSITY, Section 3. ACADEMIC TENURE A-56

TENURE POLICIES AND REGULATIONS OF FAYETTEVILLE STATE UNIVERSITY, Section 5. NONREAPPOINTMENT OF FACULTY MEMBERS ON PROBATIONARY APPOINTMENTS A-66

APPENDIX E

THE CODE BOARD OF GOVERNORS THE UNIVERSITY OF NORTH CAROLINA SECTION 501 C. RELATION OF PRESIDENT TO THE UNIVERSITY A-75

THE CODE BOARD OF GOVERNORS THE UNIVERSITY OF NORTH CAROLINA SECTION 502 C.(4) CHANCELLORS OF CONSTITUENT INSTITUTIONS A-76

THE CODE BOARD OF GOVERNORS THE UNIVERSITY OF NORTH CAROLINA ACADEMIC FREEDOM AND TENURE SECTION 600 FREEDOM AND RESPONSIBILITY IN THE UNIVERSITY COMMUNITY A-77

THE CODE BOARD OF GOVERNORS THE UNIVERSITY OF NORTH CAROLINA SECTION 601 ACADEMIC FREEDOM ANDRESPONSIBILITY OF FACULTY A-78

THE CODE BOARD OF GOVERNORS THE UNIVERSITY OF NORTH CAROLINA SECTION 602 ACADEMIC TENURE..... A-79

THE CODE BOARD OF GOVERNORS THE UNIVERSITY OF NORTH CAROLINA SECTION 604 APPOINTMENT, NONREAPPOINTMENT AND REQUIREMENTS OF NOTICE AND REVIEW A-81

THE CODE BOARD OF GOVERNORS THE UNIVERSITY OF NORTH CAROLINA SECTION 604 A. NOTICE OF REAPPOINTMENT OR NONREAPPOINTMENT A-82

THE CODE BOARD OF GOVERNORS THE UNIVERSITY OF NORTH CAROLINA SECTION 604 B. IMPERMISSIBLE REASONS FOR NONREAPPOINTMENT A-83

THE CODE BOARD OF GOVERNORS THE UNIVERSITY OF NORTH CAROLINA APPENDIX [T THE CODE]. .DELEGATION OF DUTY AND AUTHORITY TO BOARDS OF TRUSTEES A-84

APPENDIX F

CIVIL RIGHTS STATUTES 42 U.S.C. SECTION 1981 EQUAL RIGHTS UNDER THE LAW A-86

CIVIL RIGHTS STATUTES 42 U.S.C. SECTION 1983 ..... A-88

CIVIL RIGHTS STATUTES 42 U.S.C. SECTION 1985. CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS A-88

TABLE OF AUTHORITIES CITED

Cases	Page
Armstrong v. Manzo, 380 U.S. 545, 552 (1965)	27
Barry v. Barchi, 443 U.S. 55, 66 (1979)	6, 28
Board of Regents of State Colleges et al. v. Roth, 408 U.S. 564 at 582, 92 S.Ct. 2701, 2703	3, 24, 25, 27
Bone v. City of Lafayette, 763 F.2d 295, 298 (7th Cir. 1985)	4
Cleveland Board of education v. Loudermill, 470 U.S. 532, 541, 547, 105 S.Ct. 1487, 1496, 84 L.Ed.2d 495 (1985)	6, 7, 28, 29
D'Acquisto v. Washington, 640 F.Supp. 594, 618 (N.D. Ill.)	7, 29
Fusari v. Steinberg, 419 U.S.379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975)	6, 29
Grannis v Ordean, 234 U.S. 385, 394 (1914)	27
Jett v Dallas Independent School District, 491 U.S. 701 (1989)	7, A-21
Keyishian v. Board of Regents, 385 U.S. 589, 603	3, 24
Lawson v. Sheriff of Tippecanoe County, 725 F.2d 1136, 1138 (7th Cir. 1984)	4

Logan v. Zimmerman Brush Co. et al,
455 U.S., 422, 429 . . . . . 27, 28

Mathews v. Eldridge,
424 U.S. 319, 340, 342, 96 S.Ct., 893, 905, 906,
47 L.Ed.2d 18 (1976) 6, 29, 30

Meyer V. State of Nebraska,
262 U.S. 390, 399, 43 S.Ct.625, 627,
67 L.Ed.2d 1042 (1922/23) 4, 21, 22, 24

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 26, 28

Sindermann v. Perry,
430 F.2d 939, 944, 945 (CA 5) 26

Sweezy v. New Hampshire,
354 U.S. 234, 261-262 . . . . . 4, 24

STATUTES AND REGULATIONS

Code Page

42 U.S.C., Section 1981
Equal Rights Under The Law 7, 8, 9, 20, A-86

42 U.S.C., Section 1983 . . . . . 7, 9, 20, A-88

42 U.S.C., Section 1985 . . . . . 7, 9, A-888

Equal Protection 20

The Fayetteville State Tenure Policies
and Regulations . . . . . .

Section 1 . . . . . .10, 23, 26, A-54

Section 2 . . . . . 23, 26, A-55

Section 3.C. 11, 12, 15, A-59, A-60, A-63, A-64

Section 5.A. 11, 27, 28, A-66

Section 5.D. 16, 27, 28, A-66

Section 5.G. 17, 29, A-73

The Code of The University of North Carolina

Academic Freedom 9, 24, 26, A-77, A-78

Section 501 C 2, A-75

Section 502 C 18, A-76

Section 604 B 10, A-83

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

PETITION FOR WRIT OF CERTIORATRI

Tenkasi M. Viswanathan, Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix A at page A-1 to the petition and is unpublished. The opinion was entered on September 3, 1996.

The Order and Memorandum of the United States District Court for the Middle District of North Carolina granting defendants' Motion to Dismiss were entered on March 1, 1996. They appear in Appendix B at pages A-4 and A-5

respectively. Petitioner-plaintiff's motion to make additional findings and amend or alter the Order and the Memorandum was denied by order filed on April 23, 1996 stating that the District "Court lacke[d] jurisdiction to rule on Plaintiff's Combined Motion Under Rules 52(b) and 59(e) [of the Federal Rules of Civil Procedure]." The April 23, 1996 order appears in Appendix C at A-51. No publication on this case has been reported.

The three administrative Decisions of The University of North Carolina appear in Appendix B at A-27, A-29; A-34, A-35; and A-44, and A-46 respectively. The Decision by the Fayetteville State University Board of Trustees appears in Appendix B at A-42.

JURISDICTION

The date on which the United States Court of Appeals decided the case was September 3, 1996. Petitioner invokes the jurisdiction of the Supreme Court of the United States under 28 U.S.C., Section 1254(1).

The jurisdiction of the Supreme Court of the United States to review the Orders in question by writ of certiorari is conferred by Rule 10.(c) of the Rules of the Supreme Court of the United States:

MATTERS OF ACADEMIC FREEDOM

This case involves a question on academic freedom of university faculty members that is secured by state law and regulations. Under these regulations research and publication and matters of concern and inquiry into knowledge are included in academic freedom and academic freedom is secured and guaranteed as a matter of law as an essential condition for faculty members to discharge their duties. Under these circumstances, the decision of the Fourth Circuit Court of Appeals affirming the District Court's finding that concern about research and publication are not of public concern conflicts with relevant decisions of this Court. This Supreme Court has already decided this question in Keyishian v. Board of Regents, 385 U.S. 589, 603 (academic freedom is of transcendent value) cited in Board of Regents

of State Colleges et al. v. Roth, 408 U.S. 564 at 582, 92 S.Ct. 2701, 2703; in Sweezy v. New Hampshire, 354 U.S. 234, 261-262 (Mr. Justice Frankfurter concurring in result) (research is for society's good and in the interest of wise government), cited in Roth at 408 U.S. 564 at 581; and in Meyer V. State of Nebraska, 262 U.S. 390, 399, 43 S.Ct.625, 627, 67 L.Ed.2d 1042 (1922/23) (freedom to engage in the profession of a teacher and to exercise what is essential to that profession is a liberty right). Any liberty interest is a matter of public concern. This is particularly so, when there is a regulation that guarantees this interest.

Moreover, the United States Court of Appeals for the Seventh Circuit has made decisions on this question in ways that conflict with the decision of the Fourth Circuit Court of Appeals. In Bone v. City of Lafayette, 763 F.2d 295, 298 (7th Cir. 1985), the Circuit Court held that liberty interest includes the general freedom to take advantage of such opportunities as may arise in one's occupation. Please see also Lawson v. Sheriff of Tippecanoe County, 725 F.2d

1136, 1138 (7th Cir. 1984). Academic freedom including questions and concerns on research, publication and the like is such an opportunity, which is further secured by the state as an essential condition of the profession of university teaching. Any such liberty needs to be jealously guarded and so is a matter of public concern.

WHEN DOES DELAY CONSTITUTE A CLAIM?

This case provides the Court with an opportunity to define the "constitutional dimensions of delay" that should be stated in a complaint to survive a motion to dismiss? This case started in February, 1990 and the final administrative decision was made only in September, 1994. During the four and one-half years of its course, the case followed a tortuous path going through one judicial review (Appendix B at A-38), three administrative reviews by the Respondent University of North Carolina Board of Governors ("UNC Board" or "UNC Board of Governors" hereinafter), a hearing before the Respondent Fayetteville State University Board of

Trustees ("FSU Trustees"), and two hearings before the Fayetteville State University ("FSU" hereinafter) Hearing and Reconsideration Committee. Please see Appendix B at A-29, A-35, A-44, and A-42. When all of it was done, Petitioner did not get the process that was his due. The two lower courts did not consider plaintiff's claim that this delay and the due process that was finally given to Petitioner did not meet constitutional standard under the Fourteenth Amendment. The decision of the two lower courts to consider this question does not comport with the "constitutional dimensions of delay" set out in this Court's decision in Barry v. Barchi, 443 U.S. 55, 66 (1979) ("At some point, a delay in the post-termination hearing would become a constitutional violation."), cited in Loudermill, 470 U.S. at 547, 105 S.Ct. at 1496. See also Mathews v. Eldridge, 424 U.S. 319, 340, 342, 96 S.Ct., 893, 905, 906, 47 L.Ed.2d 18 (1976); Fusari v. Steinberg, 419 U.S.379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975). Both Mathews and Fusari discuss constitutional dimensions of delay between first and

second stage hearings. "Too much postponement for too long will be a violation regardless of the adequacy of the first stage hearing. The Supreme Court said as much in Loudermill.", citing Cleveland Board of education v. Loudermill, 470 U.S. 532, 541, 547, 105 S.Ct. 1487, 1496, 84 L.Ed.2d 495 (1985). Quoted from D'Acquisto v. Washington, 640 F.Supp. 594, 618 (N.D. Ill.). Even though this Court has dealt with this problem in the above cases at "the proof stage of the claim", it has not explicitly dealt with the question of what are the elements of such a claim to survive a motion to dismiss.

THE 1991 AMENDMENT TO 42 U.S.C SECTION 1981 AND COLOR OF STATE LAW

This Court decided in 1989 in Jett v Dallas Independent School District, 491 U.S. 701 (1989) that when State actors are involved, 42 U.S.C., Section 1983 was intended to be the exclusive federal remedy for violation of rights guaranteed under 42 U.S.C., Section 1981. However, in the year 1991, Congress amended Section 1981 and has

brought that section more in line with Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e et seq.) as amended in 1970. "Impairment under color of State law" is part of the text of the amended act. Moreover, the amendment includes both "impairment by governmental discrimination and impairment under color of State law." Appendix F at A-86. This Court has not decided this question after the 1991 amendment. After the amendment, Section 1981 takes the character and color of Section 1985 as well as Title VII of the Civil Rights Act as amended in 1970. Section 2 of Pub.L. 102-166 authorizing the amendment stated:

The Congress finds that ---

(1) "additional remedies under Federal Law are needed to deter unlawful harassment and intentional discrimination in the workplace;
(2) . . .
(3) "legislation is necessary to provide additional protections against unlawful discrimination in employment."

Moreover, Petitioner has proceeded pro se and has never had any opportunity to conduct any discovery related to the case, as the regulations do not provide for depositions,

interrogatories or other forms of discovery. Thus in spite of the fact that the case has ran its course over a period of five and one-half years, there has not been any discovery at all. The dismissal means also the loss of an opportunity even to litigate. Would such a dismissal be just under the tortuous circumstances of this case? The lower courts have applied a very harsh standard.

These important questions of federal law have not been, but should be, settled by the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition involves Constitutional Amendment One, the Due Process Clause of the Fourteenth Amendment, and applications of these provisions under 42 U.S.C., Section 1983. Appendix F at A-88. The case involves claims under 42 U.S.C., Section 1981, 1985, 1986 as well as 2000e et seq. Petitioner appeals to the regulations in The Code of The University of North Carolina, (Appendix E) and those in the

Tenure Policies and Regulations of Fayetteville State University. (Appendix D)

STATEMENT OF THE CASE

Petitioner Viswanathan was Plaintiff-Appellant before the United States Court of Appeals for the Fourth Circuit. Petitioner (Plaintiff) was appointed during the academic year 1989-90 to a tenure-track position as an Associate Professor to the faculty of the Department of Mathematics and Computer Science of Fayetteville State University (FSU hereinafter). Fayetteville State University is one of the 16 constituent institutions of The University of North Carolina. By letter dated February 8, 1990, he was given timely notice that he would not be reappointed to a second one-year term. Even though Viswanathan was holding a probationary appointment, the fact that he was an associate professor entitled him to the "incidents of academic tenure" designed to protect academic freedom in constituent institutions of The UNC. The regulations state as follows in **Section 604 B.** under the heading "**Impermissible Reasons for**

Nonreappointment" of faculty members on probationary appointments (Appendix E at A-83):

> **In** no event shall a decision not to reappoint a faculty member be based upon (a) the exercise by the faculty member of rights guaranteed by the First Amendment to the United States Constitution, or by Article I of the North Carolina Constitution, or (b) discrimination based upon the faculty member's race, sex, religion, or national origin; or (c) personal malice.

Please see also Section 5.A of the FSU Tenure Policies and Regulations ("FSU Tenure Policies" hereinafter). The section is entitled" **NONREAPPOINTMENT" OF FACULTY MEMBERS ON PROBATIONARY APPOINTMENTS,** and it provides the procedural due process that is applicable, when the decision not to reappoint is contested. Appendix D at A-66. Section 3.C.(2) of the FSU Tenure Policies regulates how a "Decision Not to Reappoint Upon Expiration of Probationary Terms" should be made. Appendix D at A-63. The regulations define the channel for academic review at A-62. The regulations also use the term "chairman" in a generic way; "chairman" could mean "Dean [of a college or

school]", or the "Vice Chancellor for Academic Affairs". Similarly, "Department" could mean "College", "School", or "the Division of Academic Affairs". Appendix D at A-61. In order to guarantee academic freedom, the regulations under Section 5 require that the decision not to reappoint be pinned on a single academic officer, who should also be the first such officer making the first decision not to reappoint in the channel for administrative review. Under the regulations in Appendix D at A-64, the decision not to reappoint is final, "except as it may be later reviewed in accordance with the provisions of Section 5." Appendix D at A-64.

If the Chancellor makes the final decision, then the internal campus review process in Section 5 of the FSU Tenure Policies will not be applicable. In such a case, a direct appeal to the UNC Board would lie under Section 501 C(4) of The Code of The University of North Carolina. This direct appeal is in Appendix E at A-75. Please see footnote 6 in Section 5 of the FSU Tenure Policies, Appendix D at A-67.

The 1990 decision of FSU not to reappoint Petitioner was made by Respondent Dr. Joseph Monroe, then Vice Chancellor for Academic Affairs at FSU. Petitioner stated in paragraph 51(a)(1) of his Complaint that "[i]n the early fall of 1989, [he] made statements at several meetings of the faculty which were quite critical of the academic administration at FSU." He also stated in paragraph 51(a)(6) that "[o]n December 4, 1989, at a faculty meeting with the Chancellor, [he] publically criticized Dr. Monroe for failing to emphasize publication and research."

Petitioner contested the 1990 nonreappointment decision of Respondent Monroe alleging that Dr. Monroe's decision was retaliation for the exercise of his rights guaranteed by the First Amendment to the U.S. Constitution or Article 1 of North Carolina's Constitution. Petitioner also contested that Dr. Monroe's decision was based on personal malice. Petitioner followed the procedures in Section 5 of the FSU Tenure Policies and appealed to the FSU Hearing and Reconsideration Committee, which reported that

Petitioner had "adequately supported his contentions regarding the reasons [personal malice and retaliation for exercise of First Amendment rights] for his non-reappointment." The Committee recommended that the non-renewal decision be reversed." Respondent Hackley did not accept the recommendation and Petitioner then appealed to the FSU Trustees and the UNC Board. The UNC Board stated as follows in its report (paragraph 52, Complaint):

> The evidence presented tends to show that the negative recommendation of the Vice Chancellor could have been based in part on Professor Viswanathan's critical remarks. Because the remarks appear to be protected speech, this possible motivation on the Vice Chancellor's part would violate the First Amendment to the U.S. Constitution.

The UNC Board ordered the following remedy (paragraph 53, complaint):

> An appropriate remedy in cases where a nonreappointment decision is based on an impermissible reason is to conduct a new review of the faculty member's credentials. Such a review should be removed from the prior taint, but should also allow the institution an opportunity to consider the current credentials of the faculty member. To accomplish these ends, the Committee recommends that the nonreappointment decision be reversed.

The UNC Board reversed the 1990 FSU decision on or about September 13, 1991. Soon after, Petitioner made the request for reappointment to his original position at FSU. Paragraph 81, Complaint. Respondents Blount, Young, Edwards, and Hackley did not conduct the new review ordered by the UNC Board (Paragraph 82, Complaint). Interpreting the rule in Appendix D at A-59, A-60 of the FSU Tenure Policies, Petitioner contended that FSU should have made a decision on the reappointment by February 15, 1992 and that he was entitled for an automatic reappointment under the said regulation.

In the absence of any initiative from FSU, Petitioner made a second appeal to the UNC Board. The UNC prescribed May 8, 1992 as a deadline. FSU conducted the review and on or about March 20, 1992, the Department Chairman, Respondent Blount approved Petitioner's reappointment. Paragraph 84, Complaint.

On May 6, 1992, FSU announced that FSU would not reappoint Petitioner. Paragraph 88, Complaint. Petitioner

then asserted that "important procedures" in Sections 5 of the FSU Tenure policies were not followed. Paragraph 98, Complaint. Dissatisfied with the FSU 1992 decision, he "had to seek a judicial review of the 1992 decision of FSU and the UNC Board, pursuant to N.C.G.S., Section 150B-45. Paragraph 100, complaint. This "court order became necessary to initiate review under Section 5 [of the FSU Tenure Policies]." Paragraph 98, Complaint. He also alleged that the 1992 "review for reappointment was not 'initiated at the department level'" as ordered by the UNC Board through its Order of September 13, 1991. Paragraph 99, Complaint.

After the judicial review under N.C.G.S., Section 150B-45, and the court order resulting therefrom, the review under Section 5 of the FSU Tenure Policies was 'initiated after a year's break in March, 1993." Paragraph 98, Complaint. The FSU Hearing Committee did not give a timely review under Section 5.D of the FSU Tenure Policies, even after the Court order. Paragraph 98, Complaint.

The 1992 non-reappointment decision was made by respondent Jon Young. Viswanathan alleged impermissible reasons for the nonreappointment decision. A hearing took place and in July, 1993, the FSU Hearing and Reconsideration Committee found that "the 1992-nonreappoitment decision of Dr. Jon Young, Acting dean of the College of Arts and Sciences (CAS) was based upon the impermissible reasons of personal malice, of plaintiff Viswanathan's exercise of rights guaranteed by the First Amendment to the United States Constitution, and of discrimination based on national origin." Paragraph 101, Complaint.

When the Section 5 review of the 1992 decision was undertaken after the court order (Appendix B at A-38), the procedure in Section 5.G. of the FSU Tenure Policies was not followed. Paragraphs 105, 106, 107 , and 98 of the Complaint. The regulation under Section 5.G. required that respondent Young manifest himself in writing, based on the recommendation of the FSU Hearing Committee, as to what

modification he would make as to his original decision not to reappoint. Appendix D at A-73. It is always his decision that should be reviewed, keeping the impermissible reasons on focus. The Chancellor or any other officer is prohibited from speaking on his behalf.

After the July, 1993 decision of the FSU Hearing and Reconsideration Committee, FSU made yet another administrative decision by the FSU Chancellor. Paragraph 114, Complaint. Under the FSU regulations, the FSU Chancellor as an executive officer has no appellate jurisdiction . He only serves as a medium of communication between the Hearing Committee and the FSU Trustees. Section 502.C.(4), The Code. Appendix E at A-76 The regulations accord great preeminence to academic freedom. They require that the non-reappointment decision be that of a single administrative officer. There is no shared responsibility for a nonreappoitment decision of a faculty member at FSU.

The review process died with a letter that Respondent Hackley wrote on or about August 2, 1993. Paragraph 114, Complaint.

Petitioner alleged serious violations and continued the appellate process. The process continued with the FSU Trustees (October 5, 1993 at A-42). The UNC Board made its final decision on or about September 9, 1994. Appendix B at A-46.

Plaintiff filed suit immediately on or about September 13, 1994 in U.S. District Court for the Middle District of North Carolina. Plaintiff asserted that he had a right for the review under Section 5 and that he did not get the process that was his due. Paragraphs 117, and 122, Complaint.

He alleged that the 1990 nonreappointment decision of respondent Monroe was retaliation for the exercise of his First Amendment rights of free speech. Paragraphs 51, 76, and 80, Complaint.

In Paragraphs 118, 121, Petitioner asserted that Petitioning the properly constituted authorities is a First

Amendment right and that the nonreappointment decision and the inordinate delay were acts of retaliation for the exercise of these first amendment rights. He also made the necessary connection to 42 U.S.C., Section 1983 in stating these claims.

Petitioner also asserted an Equal Protection Claim under the Fourteenth Amendment stating that the second review created a discriminatory class to which he was assigned. The facts about the second review concerning the February 15, 1992 date created a class that was in violation of the Equal Protection Clause of the Fourteenth Amendment. Paragraphs 56, 57, 58, and 128. Complaint.

In paragraph 58, petitioner stated that "[t]he rights to lawful proceedings and to the enjoyment of the benefits of his contract are secured to him by Section 42, U.S.C., Section 1981." And named several defendants. He also stated the defendants discriminated against him on the basis of his alien status. Plaintiff is an alien and a citizen of India, Paragraphs 1 through 3 and 16, Complaint. The Complaint asserted

jurisdiction for this claim under 28 U.S.C. Sections 1331, 1343(a)(3, 4).

Petitioner also made several statements about the connection between this case and the related case of Viswanathan v. Scotland County Board of Education et al., Case No. 96-5555, Supreme Court, pending before this court. He suggested conspiracy. Paragraphs 62 through 97. There was no discovery that involved the Respondents in this case. State regulations do not provide for one.

Petitioner also stated a claim based on delay in paragraphs 59, 60, 61, 82, 121, 122, 98, 100,

REASONS FOR GRANTING THE PETITION

The Petitioner presents the following:

FIRST AMENDMENT CLAIM UNDER SECTION 1983

In Meyer V. State of Nebraska, 262 U.S. 390, 399, 43 S.Ct.625, 627 (1922), the Supreme Court of the United States stated:

> The American People have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The ordinance of 1787 declares:
>
> "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

The Meyer Court stated further as follows (43 S.Ct. 627):

> Practically, education of the young is only possible in schools conducted by **especially qualified persons who devote themselves thereto**. The calling always has been regarded as useful and honorable, **essential, indeed, to the public welfare**.
>
> (Emphasis added.)

In the instant case, Petitioner was an Associate Professor on tenure track at Fayetteville State University. Academic freedom is a vested legal right guaranteed by law and regulation as a condition essential to a faculty member's discharge of his duties at Fayetteville State University. Moreover, protection is guaranteed as a matter of North Carolina law, when the matter pertains to academic freedom and academic freedom is exercised "in the lawful pursuit of [one's] respective area of scholarly and professional interest

and responsibility." FSU Tenure Policies and Regulations, Section 1, recites as follows (Appendix B at A-54):

> Fayetteville State University is dedicated to the transmission and advancement of knowledge and understanding. Academic freedom is essential to the achievement of these purposes. This institution, therefore, supports and encourages freedom of inquiry for faculty members and students, to the end that they may responsibly pursue these goals through teaching, learning, **research**, discussion, and publication, free from internal or external restraints that would unreasonably restrict their academic endeavors.
>
> Fayetteville State University shall protect faculty and students in their responsible exercise of the freedom to teach, to learn, and otherwise to seek and speak the truth.
>
> (Emphasis added)

Section 2., entitled, "**Academic Freedom and Responsibility of Faculty, Tenure Policies and Regulations of Fayetteville State University** (Appendix D at A-55) provides further guarantees

Research and publication are included explicitly as important components of academic freedom essential for "transmission and advancement of knowledge and understanding." North Carolina law only echoes the

"supreme importance" of the "acquisition of knowledge" and the need to promote it as set out by the Meyer Court, supra. Please see also The Code of The UNC at Appendix E at A-77, A-78, and A-81.

To hold that research in a constituent institution of the University of North Carolina is not a matter of public importance is to hold that academic freedom is not a matter of public importance or that North Carolina law that guarantees such academic freedom is not of public importance. Such a holding is contrary to the fundamental aspirations of the American People set out in Keyishian v. Board of Regents, 385 U.S. 589, 603 (**one-year term contract**), cited in Board of Regents of State Colleges et al. v. Roth, 408 U.S. 564 at 582:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

The importance of research and the constitutional theory behind it are stated by Mr. Justice Frankfurter in Sweezy v.

New Hampshire, 354 U.S. 234, 261-262 (concurring in result), cited in Board of Regents of State Colleges et al. v. Roth, 408 U.S. 564 at 581:

> For **society's good** --- if understanding be an essential need of society --- inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible."

The right inquiry is a finding if Petitioner's remarks on research and publication fall within the purview of academic freedom and if so they were made "in the lawful pursuit of [petitioner's] area of scholarly and professional interest and responsibility." The complaint is not the place that should provide this finding. It is properly a matter that should be proved by expert witnesses and/or by the record. Moreover, this is a matter that calls for the expertise of academic personnel including the faculty. The District Court cannot decide at this early stage of the case that the matter is not one of academic freedom. Moreover, plaintiff has asked for a jury trial, and it is for the jury to decide if the matter falls within the ambit of academic freedom, exercised "in the

lawful pursuit of [petitioner's] area of scholarly and professional interest and responsibility." Such an inquiry is outside the scope of a Rule 12(b) motion to dismiss.

PRIOR ADMINISTRATIVE HEARINGS

The findings of a prior administrative hearing are "appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). In Petitioner's case, there was not one, but two such hearings by The Board of Governors of the University of North Carolina, and again two such hearings by the FSU faculty Committee. Appendix B at A-27, and A-44Their findings are relevant: Please see also Sindermann v. Perry, 430 F.2d 939, 944, 945 (CA 5),

The findings by the Board and the FSU Hearing and Reconsideration Committee raise a presumption that the critical remarks of Petitioner fall within the purview of "academic freedom" and hence protected as a matter of the cited university regulation in Appendix D at A-54, and A-55

Such a presumption raises a genuine issue and so properly states a cognizable claim under the First Amendment.

DUE PROCESS

In Armstrong v. Manzo, 380 U.S. 545, 552 (1965), the Supreme Court stated that the hearing required by the Due Process Clause must take place "at a meaningful time and in a meaningful manner." Please see Grannis v Ordean, 234 U.S. 385, 394 (1914). The instant case is unlike Board of Regents v. Roth, 408 U.S., 564, 567, 92 S.Ct. 2701, 2703 where "[s]tate law thus clearly [left] the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials." In the instant case, the decision is fettered by the operation of three impermissible reasons. Under Logan, Petitioner had protected property interests in the administrative hearing under Section 5 of the FSU Tenure Policies and Regulations. Please see Appendix D at A-66.

Like the Illinois Fair Employment Practice Act (FEPA) in Logan v. Zimmerman Brush Co., 455 U.S., 422,

424, the Code of the University of North Carolina and the Tenure Policies and Regulations of Fayetteville State University bar employment discrimination on the basis of race, national origin, sex, religion, and age. Like the FEPA, the regulations also establish a comprehensive scheme for adjudicating contentions of discrimination. There are also two other impermissible reasons. Appendix D at A-66, A-67. Viswanathan had a property right to these adjudicatory proceedings under Logan, 455 U.S. at 428, 429, 430 and Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). All the process that is due to Viswanathan is provided in Section 5 of the FSU Tenure Policies and Regulations (Appendix at A-66) The hearing that was provided was not under Section 5 and so is not meaningful under the Due Process Clause.

DELAY CONSTITUTES A CLAIM

"At some point, a delay in the post-termination hearing would become a constitutional violation." Barry v. Barchi, 443 U.S. 55, 66 (1979), cited in Loudermill, 470

U.S. at 547, 105 S.Ct. at 1496. See also Mathews v. Eldridge, 424 U.S. 319, 340, 342, 96 S.Ct., 893, 905, 906, 47 L.Ed.2d 18 (1976); Fusari v. Steinberg, 419 U.S.379, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975). Both Mathews and Fusari discuss constitutional dimensions of delay between first and second stage hearings. "Too much postponement for too long will be a violation regardless of the adequacy of the first stage hearing. The Supreme Court said as much in Loudermill." D'Acquisto v. Washington, 640 F.Supp. 594, 618 (N.D. Ill.). Viswanathan was never provided due process inasmuch as his first hearing was nullified by the reversal of the 1990 nonreappointment decision of FSU. The process that was his due after the 1992 nonreappointment decision did not take place in 1992. The February 1993 order of the Superior Court of New Hanover County (Appendix B at A-38) gave him hope that finally he would be given the process that was his due. That also did not happen since the crucial Section 5.G. was not completed and after the hearing, the original decision of Jon Young was abandoned and a new

decision by Respondent Hackley took its place without Petitioner being aware that the process was being tampered. In Mathews, the Court said that one must consider the actual procedures used and 'the risk of an erroneous deprivation of [the private] interest through the procedures used." Identified as the second Eldridge heading, it called for an examination of the risk of deprivation through the use of wrong procedures. In Petitioner's case the process that was his due never took place.

CONCLUSION

Based on the foregoing considerations, the petition for a writ of certiorari should be granted.

Respectfully submitted this the 2 nd day of December, 1996.

T. M. Viswanathan

Tenkasi M. Viswanathan, Pro-se
7405 Alcoa Way
Wilmington NC 28405
Tel: 910-686-5395